

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LISE NICOLE DORFSMAN, <u>et al.</u> ,	:	CIVIL ACTION
	:	
v.	:	
	:	
LAW SCHOOL ADMISSION COUNCIL, INC.	:	NO. 00-0306

**MEMORANDUM AND ORDER**

HUTTON, J.

November 28, 2001

Presently before the Court are Plaintiffs' Motion to Dismiss (Docket No. 73), Defendant's Reply to Plaintiffs' Motion to Voluntarily Dismiss Cause of Action (Docket No. 74), Plaintiffs' Response to Defendant's Reply to the Motion to Dismiss (Docket No. 75), and Defendant's Sur-Reply to Plaintiffs' Motion to Dismiss (Docket No. 76). For the reasons discussed below, the Court will dismiss the above matter with prejudice. In addition, the Court declines to issue an Order recognizing Defendant's right to seek fees, costs, and expenses incurred in this litigation. The Court further finds that Plaintiffs are precluded from seeking attorney's fees.

**I. BACKGROUND**

Plaintiffs brought suit against the Defendant Law School Admissions Council ("LSAC") on January 18, 2000 under the American's with Disabilities Act ("ADA"). The suit challenged the LSAC's policies and procedures for providing disability

accommodations to students registered to take the Law School Admissions Test ("LSAT"). The original complaint named three plaintiffs: Pearl De La Cruz, Lise Nicole Dorfsman, and Cima Fatomeh Amiri. The first named-plaintiff, Pearl De La Cruz, voluntarily withdrew from the litigation soon after the complaint was filed. On February 12, 2001, this Court approved a "Stipulation Regarding Cima Amiri" entered into by the parties and granting Plaintiff Amiri the accommodations she sought.<sup>1</sup>

On May 31, 2001, Plaintiffs filed a Motion for Class Certification. The Court denied Plaintiffs' motion with leave to renew on August 9, 2001, giving Plaintiffs thirty days to substitute a new class representative with live claims. In addition, the Court postponed any decision regarding class certification until new representatives for the class were named. Prior to the Court's ruling on the motion for class certification, Plaintiff Lise Dorfsman withdrew from the litigation on June 29, 2001.

Plaintiffs then moved this Court for voluntary dismissal of the claim on September 5, 2001. In their Motion, Plaintiffs concede that Lise Nicole Dorfsman and Cima Fatomeh Amiri have no standing to proceed with the current action. See Pls.' Mot. to Dismiss at ¶ 2. While LSAC does not oppose the dismissal of the

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<sup>1</sup> A dispute continued to exist as to Plaintiff Amiri's rights to attorney's fees.

pending action, LSAC challenges that such a dismissal should be with prejudice and should preclude Plaintiffs from seeking fees, costs and expenses associated with the litigation. Furthermore, LSAC requests an order from this Court recognizing LSAC's right to seek fees, costs, and related expenses incurred in defending against the instant lawsuit.

## **II. DISCUSSION**

### **A. Voluntary Dismissal with Prejudice**

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that "[a]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." Fed. R. Civ. P. 41(a)(2). If a motion for dismissal under Rule 41(a)(2) fails to specify whether it requests dismissal with or without prejudice, the matter is left to the discretion of the court. Spring City Corp. v. Am. Bldg. Co., Civ. A. Nos. 97-8127, 98-105, 1999 WL 1212201, \*2 (E.D. Pa. Dec. 17, 1999); see also Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2367 (1995). "A dismissal without prejudice is not a final adjudication on the merits; instead, it leaves the parties where they would have stood had the lawsuit never been brought." Selas Corp. of Am. v. Wilshire Oil Co., 57 F.R.D. 3, 8 (E.D. Pa. 1974). Conversely, a dismissal of an action with prejudice is "a

complete adjudication of the issues presented by the pleadings and is a bar to further action between the parties." Id.

"A dismissal with prejudice may be granted 'where it would be inequitable or prejudicial to defendant to allow plaintiff to refile the action.'" John T. v. Del. Co. Intermediate Unit, Civ. A. No. 98-5781, 2001 WL 1391500, at \*4 (E.D. Pa. Nov. 7, 2001) (quoting Chodorow v. Roswick, 160 F.R.D. 522, 523 (E.D. Pa. 1995)). Courts generally consider four factors when considering whether to dismiss an action with prejudice: (1) whether a motion for summary judgment has been filed; (2) the extent of a defendant's efforts and expenses in preparing for trial; (3) the excessive expenses in defending a second action; and (4) insufficient explanation for dismissal by the plaintiff. Horizon Unlimited, Inc. v. Richard Silva & SNA, Inc., Civ. A. No. 97-7430, 1999 WL 675469, at \*5 (E.D. Pa. Aug. 31, 1999) (citing Ellis v. Merrill Lynch & Co., Civ. A. Nos. 86-2865, 86-3375, 1989 WL 149757, \*4 (E.D. Pa. Dec. 6, 1989)); see also Spring City Corp., 1999 WL 1212201, \*2.

In the instant case, Defendant LSAC, while contesting the terms and conditions of dismissal, does not oppose Plaintiffs' motion to voluntarily dismiss the case. However, LSAC argues that the dismissal of this litigation should be with prejudice. See Def.'s Reply to Pls.' Mot. at 4. While Plaintiffs' motion does not specify whether it requests dismissal with or without prejudice, upon reply, Plaintiffs clarified that they would not oppose

dismissal with prejudice of "Ms. Dorfsman's personal claim as long as such a dismissal would not preclude a suit on new facts which arise thereafter . . ." Pls.' Resp. to Def.'s Mot. at 1 n.1.

The facts of this case clearly warrant dismissal of the cause of action with prejudice. Plaintiffs concede that the only named-plaintiffs, Lise Nicole Dorfsman and Cima Fatomeh Amiri, have no standing to proceed with the current action. See Pls.' Mot. to Dismiss at ¶ 2. "Cima Fatomeh Amiri received all the substantive relief which she and her doctors sought through the Stipulation approved by the Court on February 12, 2001 . . . Plaintiff Lise Dorfsman seeks no personal relief from LSAC." Id. Therefore, the action could have been dismissed for lack of standing. In addition, there is no doubt that LSAC has exhausted significant time and resources in the defending the instant matter and preparing for trial. The Docket Report details seventy-six filings since the institution of this action in January of 2000. Moreover, no motions for summary judgment have been filed.

Plaintiffs argue that dismissal with prejudice is inappropriate in the instant case because of Plaintiffs' unsuccessful attempt at class certification. See Pls.' Resp. to Def.'s Reply to Pls.' Mot. to Dismiss at 1-2. The Court denied Plaintiffs' request for class certification, granting them leave to renew if they could substitute a new class representative with live claims within thirty days. Rather than do so, Plaintiffs moved to

dismiss the cause of action in its entirety. Accordingly, no class action or class has ever been certified.

"It is the actual certification of an action as a class action . . . which alone gives birth to 'class as jurisprudential entity,' changes the action from a mere individual suit with class allegations into a true class action . . . and provides that sharp line of demarcation between an individual action seeking to become a class action and an actual class action." Shelton v. Pargo, Inc., 582 F.2d 1298, 1304 (4th Cir. 1978). Moreover, "the possibility of prejudice to absent putative class members in the pre-certification context is that, unlike the situation in a certified class action, a 'pre-certification dismissal does not legally bind absent class members.'" Larkin Gen. Hosp. v. Am. Tel. & Tel. Co., 93 F.R.D. 497, 501 (E.D. Pa. 1982). Therefore, no possible prejudice to potential class members exists, and no notice of dismissal is necessary. See id. at 503. The instant suit was brought as an individual action, and while Plaintiffs sought class certification, such an action was denied until Plaintiffs could produce a named-plaintiff with a live claim against LSAC. Plaintiff has failed to do so. Therefore, since there are no Plaintiffs in the instant action with standing and no class has been certified, the Court grants Plaintiffs' Motion for Voluntary Dismissal, but concludes that, under the circumstances, dismissal with prejudice is appropriate.

**B. LSAC's Claim for Fees, Costs, and Expenses**

LSAC seeks an order from the Court that "Defendant's right to seek fees, costs, and related expenses, as permitted under the law, is not in any way limited or curtailed as a result of Plaintiffs' voluntary withdraw of this litigation." Def. Reply to Pls.' Mot. to Dismiss at ¶ 5. The Court declines to issue such an order. Courts generally award costs and attorney's fees in cases where a voluntary dismissal has been granted without prejudice "to compensate the defendant for having incurred the expense of trial preparation without the benefit of a final determination of the controversy." Davenport by Fowlkes v. Gerber Prod. Co., Civ. A. No. 87-3198, 1989 WL 147550, \*1 (E.D. Pa., Dec. 6, 1989); John Evans Sons, Inc. v. Majik-Ironers, Inc., 95 F.R.D. 186, 191 (E.D. Pa. 1982); Citizens Sav. Asso. v. Franciscus, 120 F.R.D. 22, 24-25 (M.D. Pa. 1988) ("The imposition of costs is not always a prerequisite for a voluntary dismissal without prejudice, although it is often necessary for the protection of the defendant, and the decision whether or not to impose costs and attorney's fees upon the plaintiff is within the discretion of the court."). If an action is dismissed with prejudice, however, the court lacks the power to grant attorney's fees, barring exceptional circumstances. Horizon Unlimited, Inc. v. Richard Silva & SNA, Inc., Civ. A. No. 97-7430, 1999 WL 675469, at \*2 (E.D. Pa. Aug. 31, 1999).

For the reasons articulated above, Plaintiffs' cause of action will be dismissed with prejudice. A dismissal with prejudice "in effect grants judgment in favor of defendant at the request of the plaintiff; defendants are in the same position they would have been in had the trial occurred, except they save the additional costs of litigation." Horizon, 1999 WL 675469, at \*2. LSAC has not demonstrated any exceptional circumstances warranting the imposition of fees and costs. Therefore, the Court declines to issue an Order recognizing Defendant's right to seek fees, costs, and expenses associated with defending the current action.

**C. Plaintiffs' Claim for Attorney's Fees, Costs, and Expenses**

Finally, LSAC requests that Plaintiffs be precluded from asserting any claims for fees or costs associated with this litigation. Towards this end, LSAC further seeks to have paragraph four of the February 12, 2001 "Stipulation Regarding Cima Amiri" vacated. Paragraph four of the February 12, 2001 Stipulation states in relevant part that "[n]either party waives any right to claim or to oppose any such award of fees and expenses in connection with this Stipulation." Defendant contends that, pursuant to the Stipulation, Plaintiff Amiri is not a "prevailing party" entitled to attorney's fees under the ADA.

**1. Prevailing Party - the Buckhannon Standard**

A plaintiff who is a "prevailing party" in an ADA action may be awarded reasonable attorney's fees, including litigation



expenses and costs. See 42 U.S.C. § 12205 ("The court, . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expense, and costs."). Plaintiff is entitled to reasonable attorney's fees if she is found to be a "prevailing party" for the purposes of the underlying statute. The United States Supreme Court recently addressed the issue of whether a plaintiff is properly to be considered a "prevailing party" for the purpose of recovering attorney's fees in Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 531 U.S. 1004, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).

In Buckhannon, the Supreme Court held that it would not award attorney's fees to a party whose lawsuit was dismissed as moot, even though it was likely that the lawsuit helped bring about the legislation that rendered the action moot. Buckhannon, 121 S.Ct. at 1839. The Supreme Court rejected the so-called "catalyst theory" of attorney's fees on the ground that it might permit an award "where there is no judicially sanctioned change in the legal relationship of the parties." Id. at 1840 (emphasis added). The Court noted that a "material alteration of the legal relationship of the parties" is necessary to permit an attorney's fee award. Id. (quoting Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989)). Specifically, the Court listed two judicial outcomes

under which a party may be considered "prevailing" for the purposes of awarding attorney's fees: (1) an enforceable judgment on the merits, or (2) a settlement agreement enforceable through a court-ordered consent decree. Id. The former provides the necessary foundation for a plaintiff's status as a prevailing party because the plaintiff has received at least some relief based upon the merits of his or her claim. Id. The latter is acceptable, even without an admission of liability, because it is a "court-ordered change in the legal relationship" between the parties. Id. at 1839-41.

As noted above, Plaintiff Dorfsman voluntarily withdrew her cause of action. As she sought no personal relief from LSAC, Plaintiff Dorfsman lacked standing to pursue the instant litigation. See Pls.' Mot. to Dismiss at ¶ 2. Accordingly, she has not prevailed on any of the material issues presented in the case, nor has she effectuated a legal change in her relationship with LSAC. Therefore, Plaintiff Dorfsman is not a "prevailing party" and may not seek attorney's fees, costs, or expenses incurred in pursuing her claim. The issue thus becomes whether Plaintiff Cima Amiri, who settled her claims against LSAC, qualifies as a "prevailing party" under the standard promulgated in Buckhannon.

On February 12, 2001, this Court approved a "Stipulation Regarding Cima Amiri" that was entered into by the parties. The

Stipulation afforded Plaintiff Amiri all of the accommodations she sought in taking the LSAT. LSAC contends, however, Plaintiff Amiri is not a prevailing party because she has failed to "secure a judgment on the merits or a court-ordered consent decree . . . ." Def.'s Reply to Pls.' Mot. to Dismiss at ¶ 6 (quoting Buckhannon, 121 S.Ct. at 1840). Under the circumstances presented in the instant case, the Court agrees.

It is clear that Plaintiff Amiri, who voluntarily settled her lawsuit with LSAC, has not achieved a judgment on the merits, nor has she secured a court-ordered consent decree. Rather, the Court here is confronted with very situation that concerned the United States Supreme Court in Buckhannon - that is, a lawsuit that brought about a voluntary change in a defendant's conduct. Such a "voluntary change in conduct . . . lacks the necessary judicial imprimatur" for a plaintiff to be considered a prevailing party. Buckhannon, 121 S.Ct. at 1840; see also County of Morris v. Nationalist Movement, Nos. 00-2621 & 00-3569, 2001 WL 1456461 (3d Cir. November 16, 2001) (characterizing a prevailing party under Buckhannon as "one who has been awarded some relief by the court"); Ken-N.K., Inc. v. Vernon Twp., No. 98-1871, 2001 WL 1006265 (6th Cir. Aug. 23, 2001) (slip opinion) ("Because [plaintiffs] obtained neither a judgment on the merits nor a consent decree with respect to their claims against [defendant], they cannot be considered 'prevailing parties . . . .'"); Crabill v. Trans Union, L.L.C., 259

F.3d 662, 667 (7th Cir. 2001) ("The significance of the Buckhannon decision . . . [is] its insistence that a plaintiff must obtain formal judicial relief, and not merely 'success,' in order to be deemed a prevailing or successful party under any attorneys' fee provision . . ."); Griffin v. Steeltek, Inc., 261 F.3d 1026, 1029 (10th Cir. 2001) (holding that a plaintiff who fails to secure a judgment on the merits or by court-ordered consent decree in a suit under the ADA, is not entitled to attorney's fees even if the pursuit of litigation has caused a desired and voluntary change in the defendant's conduct).

There is a distinction between consent decrees, in which there is a court-ordered change in the legal relationship between the parties, and private settlement agreements, which require no such judicial involvement. Under Buckhannon, private settlement agreements do not confer prevailing party status. See Buckhannon, 121 S.Ct. at 1840 n.7. In the instant, the parties reached the terms and conditions of the Stipulation without any intervention from this Court. Moreover, the Court in no way imposed or dictated the substantive provisions of the Stipulation at issue. Therefore, contrary to Buckhannon, Plaintiff Amiri has failed to achieved a judicially sanctioned change in the parties' legal relationship. Accordingly, Plaintiff Amiri may not be considered a "prevailing party" for the purposes of recovering attorney's fees.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
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LISE NICOLE DORFSMAN, et al., : CIVIL ACTION  
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O R D E R

AND NOW, this 28<sup>th</sup> day of November, 2001, upon consideration of Plaintiffs' Motion to Dismiss (Docket No. 73), Defendant's Reply to Plaintiffs' Motion to Voluntarily Dismiss Cause of Action (Docket No. 74), Plaintiffs' Response to Defendant's Reply (Docket No. 75), and Defendant's Sur-Reply to Plaintiffs' Motion to Dismiss (Docket No. 76), IT IS HEREBY ORDERED that Plaintiffs' Motion for Voluntary Dismissal is **GRANTED**.

IT IS FURTHER ORDERED that Defendant's request that this Court issue an Order recognizing Defendant's right to seek fees, costs, and expenses associated with this litigation is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs are precluded from seeking fees, costs, and expenses associated with this litigation.

BY THE COURT:

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HERBERT J. HUTTON, J.